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In the

Supreme Court of the United States

JANET RENO, Attorney General of the United States, *et al.*,

Petitioners,

v.

CHARLIE CONDON, Attorney General for the State of South Carolina, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether the Driver's Privacy Protection Act of 1994 contravenes constitutional principles of federalism.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

I. THE DPPA IS NOT A VALID EXERCISE OF CONGRESS' COMMERCE POWERS BECAUSE THE DISSEMINATION OF DRIVER RECORDS BY A STATE AGENCY DOES NOT CONSTITUTE INTERSTATE COMMERCE 4

A. South Carolina's Operation of Its DMV Is Not "Commerce" Simply by Virtue of Its Levy of an Administrative Fee, Let Alone "Commerce . . . Among the States" 5

B. The Commercial Use of DMV Information by Private Parties Cannot Justify Regulation of the State, Particularly Where the DPPA Does Virtually Nothing to Curb the Private Commercial Uses Purportedly Targeted by Congress 7

II. THE DPPA VIOLATES CONSTITUTIONAL PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND THE GUARANTEE CLAUSE OF ARTICLE IV 11

A. This Court's Decisions in *New York* and *Printz* Establish That Congress May Not Flatly Coerce States or State Agencies into Implementing Federal Policy 11

TABLE OF CONTENTS—Continued

Page

B. Petitioners' Attempt to Construct a Methodology for Determining Whether a Statute Violates Federalism Is Based on an Erroneous Interpretation of This Court's Decisions in *Baker* and *Garcia* 16

C. The DPPA Violates the Guarantee Clause Because It Deprives State Citizens of the Ability to Establish the Policies Under Which Their Own State Agencies Operate 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Alden v. Maine, 119 S. Ct. 2240 (1999) 1, 3, 17-18, 21

Bates v. Jones, 131 F.3d 843 (9th Cir. 1997) 25

Buckley v. Valeo, 424 U.S. 1 (1976) 3

City of Boerne v. Flores, 507 U.S. 507 (1997) 2-3

College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999) 21

Condon v. Reno, 155 F.3d 453 (4th Cir. 1998) 2, 11, 15, 20

Condon v. Reno, 972 F. Supp. 977 (D.S.C. 1997) 2

Duncan v. McCall, 139 U.S. 449 (1891) 23

Garcia v. San Antonio Metropolitan Transportation Authority, 469 U.S. 528 (1985) 6, 17, 19-21

Gregory v. Ashcroft, 501 U.S. 452 (1991) 24-25

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 1

Maryland v. Wirtz, 392 U.S. 183 (1968) 6, 8

National League of Cities v. Usery, 426 U.S. 833 (1976) 20

New York v. United States, 505 U.S. 144 (1992) .... passim

Oklahoma Department of Public Safety v. United States, 68 U.S.L.W. 3055 (July 20, 1999) (No. 98-1760) 4

TABLE OF AUTHORITIES—Continued

Page

Printz v. United States, 521 U.S. 898 (1997) ..... passim

Pryor v. Reno, 171 F.3d 1281 (11th Cir. 1999) 4-5

Reno v. Condon, 119 S. Ct. 1753 (1999) 2

Reno v. Pryor, 68 U.S.L.W. 3096 (Aug. 3, 1999) (No. 99-61) 5

South Carolina v. Baker, 485 U.S. 505 (1988) ... 17-19, 21

State of Oklahoma ex rel. Oklahoma Department of Public Safety v. United States, 161 F.3d 1266 (10th Cir. 1998). 4

Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998) 4

United States v. Lopez, 514 U.S. 549 (1995) 1-2, 11

West v. Anne Arundel County, Maryland, 137 F.3d 752 (4th Cir. 1998) 22

Wickard v. Filburn, 317 U.S. 111 (1942) 10-11

Wisconsin Department of Transportation, Division of Motor Vehicles v. Reno, 68 U.S.L.W. 3055 (July 20, 1999) (No. 98-1818) 4-5

United States Constitution

Article I, Section 8, Clause 3 4

IV, § 4 23

Tenth Amendment 11

State and Federal Statutes

18 U.S.C. § 2721 9

§ 2721, *et seq.* 2

TABLE OF AUTHORITIES—Continued

Page

§ 2721(12) 10

S.C. Code Ann. §§ 56-3-510 to 56-3-540 (West Supp. 1998) 7

Rules

Supreme Court Rule 37 1

Rule 37.6 1

Miscellaneous

79 Op. Att'y Gen. No. 76 (June 10, 1996) 27

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Col. L. Rev. 1 (1988) 23

Thomas H. Odom and Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment*, 53 U. Miami L. Rev. 71 (1998) 7, 14-15, 27

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the Respondents.[1] Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

PLF has participated in numerous cases concerning the scope of the Commerce Clause and federalism. For example, PLF participated as amicus curiae before this Court in *Alden v. Maine*, 119 S. Ct. 2240 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); and *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

PLF believes that the significance of this case reaches beyond its facts because it addresses a fundamental question of law that goes to the heart of how the Constitution allocates power between the federal government and the states. Amicus seeks to augment the arguments in the Respondents' brief regarding the proper understanding of the federalist system

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

established by the Constitution. PLF believes its public policy perspective and litigation experience dealing with federalism and the Constitution's enumeration of powers will provide this Court with a broader policy viewpoint than that presented by the parties and believes its broader viewpoint will aid this Court in the resolution of this case.

STATEMENT OF THE CASE

The State of South Carolina is challenging the constitutional validity of the Driver's Privacy Protection Act (DPPA). 18 U.S.C. § 2721, *et seq*. The DPPA, a federal law, prohibits South Carolina's Department of Motor Vehicles (DMV) employees, under threat of criminal and civil liability, from disclosing driver record information to members of the public.[2] *Id*. Conversely, South Carolina requires that these records be available to the public under state open records laws. *Condon v. Reno*, 155 F.3d 453, 457 (4th Cir. 1998).

South Carolina challenged the DPPA, alleging that the Act violated the Tenth Amendment. *Id*. at 456. The district court agreed with South Carolina and enjoined the Act's enforcement. *Condon v. Reno*, 972 F. Supp. 977, 979 (D.S.C. 1997). On appeal, the Fourth Circuit affirmed. *Condon v. Reno*, 155 F.3d at 465. The Petitioners, United States Attorney General Janet Reno and the United States, petitioned this Court for a writ of certiorari which this Court granted. *Reno v. Condon*, 119 S. Ct. 1753 (1999).

SUMMARY OF ARGUMENT

There are at least two ways a federal law can be held constitutionally invalid. One is where Congress enacts a law for which the Constitution has not granted it authority. *See, e.g., United States v. Lopez*, 514 U.S. 549; *City of Boerne v. Flores*,

[2] South Carolina's motor vehicle agency is called the Department of Public Safety. For uniformity among the briefs, amicus adopts the generic designation "DMV."

507 U.S. 507 (1997); *Alden v. Maine*, 119 S. Ct. 2240. Another is where an affirmative provision of the Constitution, for example the First Amendment, specifically protects certain spheres of individual or state activity from federal encroachment. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *Printz v. United States*, 521 U.S. 898. This brief will explain that the DPPA is invalid under either standard.

Congress lacks authority under the Commerce Clause to enact the DPPA because the DPPA does not regulate interstate commerce or an activity that substantially affects interstate commerce. Petitioners' arguments that the DPPA is valid commerce legislation because: (1) states "sell" DMV records and (2) purchasers of DMV records use such records for commercial purposes, are unavailing. First, a state's ability to collect administrative fees does not automatically render a state agency's action subject to federal commerce legislation; rather, the ability to engage in such functions is an attribute of a sovereign government. Further, the DPPA operates without regard to such fees. Second, the potential for commercial use of DMV information *by private parties* does not authorize Congress to regulate *the state's* dissemination of DMV records *for all purposes*. An incidental connection to interstate commerce is not sufficient to enable Congress to intrude wholesale into the internal operation of state agencies.

Further, even if Congress could regulate state driver records under its commerce powers, the constitutional principle of federalism, as exemplified by the Tenth Amendment and Guarantee Clause, prohibits Congress from dictating the policies of South Carolina's Department of Motor Vehicles. This Court's decisions in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898, established that Congress could not coerce the states into implementing federal policy. Further, the Guarantee Clause demonstrates that the Constitution intended state citizens to be able to govern themselves through state government. The DPPA upsets this

structure by depriving state citizens of the ability to choose the policies by which their own state agencies should be operated. For these reasons, the DPPA is unconstitutional.

I

THE DPPA IS NOT A VALID EXERCISE OF CONGRESS' COMMERCE POWERS BECAUSE THE DISSEMINATION OF DRIVER RECORDS BY A STATE AGENCY DOES NOT CONSTITUTE INTERSTATE COMMERCE

Article I, Section 8, Clause 3, of the Constitution states:

> The Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

The Petitioners assert there is "no doubt" that the DPPA was validly enacted as commerce legislation. Brief for the Petitioners at 21. However, despite the certainty with which they issue this statement, and their suggestion that the issue is not properly before this Court, *id.* at 22 n.9, the Petitioners nevertheless expend several pages of the brief arguing the point. *Id.* at 12, 20-24. As the Question Presented asks simply whether the DPPA violates the constitutional principle of federalism, and because the principle of federalism involves the issue of whether Congress is properly acting within the confines of the Constitution's grant of power, whether the DPPA is valid commerce legislation is properly before this Court.[3]

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[3] Furthermore, Commerce Clause challenges were raised in other cases challenging the validity of the DPPA. *See Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999); *Travis v. Reno*, 163 F.3d 1000 (7th Cir. 1998); *State of Oklahoma ex rel. Oklahoma Department of Public Safety v. United States*, 161 F.3d 1266 (10th Cir. 1998). Petitions on these cases are currently pending before this Court. *Oklahoma Department of Public Safety v. United States*, 68 U.S.L.W. 3055 (July 20, 1999) (No. 98-1760); *Wisconsin Department of Transportation*,

(continued...)

The Petitioners' argument is twofold. First, it asserts that the State of South Carolina's "sale" of driver information is itself "interstate commerce." Brief for the Petitioners at 22. Second, it alleges that the information, once sold, is used in interstate commerce, and is therefore subject to regulation. *Id.* at 22-23. But, as explained below, upon examination, the evidence garnered in support of these arguments is both scant and inadequate. Moreover, even if the government could establish a sufficient interstate commerce connection through these means, Congress' complete usurpation of state policy choices regarding the treatment of state-maintained driver records through the DPPA reaches so far beyond any arguable connections to interstate commerce that it cannot be justified as a regulation of activities that substantially affect interstate commerce.

A. South Carolina's Operation of Its DMV Is Not "Commerce" Simply by Virtue of Its Levy of an Administrative Fee, Let Alone "Commerce . . . Among the States"

The Petitioners attempt to make much of the fact that state departments of motor vehicles, including that of South Carolina, collect a fee for the "sale" of state motor vehicle record information. They aver that

> state DMVs frequently sell the personal information held in their records, and that States collect substantial sums from such sales.

Id. at 22. Remarkably, the Petitioners' argument appears to be based upon the bare assertion that, because a state agency operates like a business enterprise whenever it charges an administrative fee (that is, it exchanges a fee for services), this

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[3](...continued)
Division of Motor Vehicles v. Reno, 68 U.S.L.W. 3055 (July 20, 1999) (No. 98-1818); *Reno v. Pryor*, 68 U.S.L.W. 3096 (Aug. 3, 1999) (No. 99-61).

creates a general license for Congress to intrude wholesale into state regulatory programs under its commerce powers. That is, the Commerce Clause would authorize Congress to dictate the policies of any state agency on matters ranging from building permitting to the regulation of attorneys, doctors, and cosmeticians.[4]

The fact that the State of South Carolina or any other state may charge an administrative fee to cover the cost of reproducing state records is insufficient to create a jurisdictional "hook" by which Congress can intrude into the inner workings of *any* state's DMV. Nothing in the DPPA limits its application to those states which charge administrative fees, and if states like South Carolina repealed their fee statutes, the DPPA would still require these states to comply with its mandates. For example, the State of California does not charge a fee at all--because it does not release driver records at all. But this does not exempt California and the 15 other states with confidential records policies from complying with the DPPA's provisions. Thus, the fee charged by *some* states is completely irrelevant for purposes of Commerce Clause jurisdiction.

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[4] Like these permitting programs, a state DMV's primary function is as a regulatory agency, and the dissemination of driver records is incidental to this function. Though this Court in *Garcia v. San Antonio Metropolitan Transportation Authority*, 469 U.S. 528 (1985), eschewed the notion that courts could distinguish between state activities on the basis of what did or did not constitute "traditional government functions," *id.* at 534 (citation omitted), regulatory functions like the licensing and registration of drivers and vehicles, with their attendant legal ramifications, are quintissentially governmental, as contrasted with the operation of bus systems (*Garcia*) and schools and hospitals (*Maryland v. Wirtz*, 392 U.S. 183 (1968)). Thus, even though the Petitioners presume that such state functions always fall within Congress' commerce authority, this Court has not always so held, and the presumption is open to question.

B. The Commercial Use of DMV Information by Private Parties Cannot Justify Regulation of the State, Particularly Where the DPPA Does Virtually Nothing to Curb the Private Commercial Uses Purportedly Targeted by Congress

The Petitioners' alternative argument is that Congress has authority under the commerce power to regulate DMV records because businesses may utilize the information gleaned from South Carolina's DMV for the purpose of mass marketing.

That individuals may utilize DMV information for commercial purposes is beyond debate. But it hardly explains why the uses to which private parties may put this information entitles Congress to regulate the *State of South Carolina*. South Carolina does not dictate the purposes for which others may use the DMV information they disseminate, and does not discriminate in the administration of its open-records policy between those who would seek to use DMV records for commercial purposes and those who would use them for noncommercial purposes.[5] Rather, it administers its policy in a perfectly neutral manner. South Carolina's administration of DMV records cannot become "commerce" simply because the recipient of such information, at his or her option, uses such information for commercial purposes. While those accessing driver records may use the information for commerce, they also may use the information for many other and varied noncommercial uses. *See* Thomas H. Odom and Gregory S. Feder, *Challenging the Federal Driver's Privacy Protection Act: The Next Step in Developing a Jurisprudence of Process-Oriented Federalism Under the Tenth Amendment* 53 U. Miami L. Rev. 71, 109-10 (1998). If the Petitioners' arguments justify congressional interference, Congress could regulate other state licensing schemes more directly related to commerce such as

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[5] South Carolina prohibits the use of DMV information for telephone solicitation. S.C. Code Ann. §§ 56-3-510 to 56-3-540 (West Supp. 1998).

licenses for building contractors, doctors, cosmeticians, and so forth. In contrast, the chasm between South Carolina's administration of its DMV records and interstate commerce carried out by private parties is extraordinarily wide: the regulation of the former can hardly be characterized as a necessary and proper means to reach the latter.

The legislative history cited in the Petitioners' brief demonstrates that, at best, Congress heard testimony asserting that mass marketers find the information contained in DMV records to be particularly useful for certain marketing efforts. Brief for the Petitioners at 4-6, 17, 22-23. But nothing in the legislative history recited by the Petitioners indicates that Congress ever attempted to justify the DPPA as regulating that commerce. Instead, the evidence that mass marketers utilize DMV information is little more than a gesture of *homage* to the notion of constitutionally enumerated powers than an explanation of how this commerce warranted federal regulation through the enactment of the DPPA. *See* Brief for the Petitioners at 4. In short, this is a situation in which Congress used "a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. at 197 n.27.

The fact is, the DPPA is not about commerce at all. Instead, it is a decision by Congress that its own policy choices on the administration of state driver records is wiser than that of the individual states. Indeed, the Petitioners concede as much:

> The overarching theory of the DPPA is that, except in certain circumstances *in which Congress has found an important public interest* warranting disclosure, the [DPPA restricts] dissemination of personal information in state DMV records.

Brief for the Petitioners at 6 (emphasis added). And:

> The Act permits DMVs to disclose personal information . . . in circumstances *in which Congress found* that the public interest in disclosure for a particular use outweighs concerns about invasion of privacy.

Id. at 8 (emphasis added). And:

> Congress has prohibited many kinds of disclosures but has permitted personal information to be released *in circumstances where it has found an important countervailing interest* warranting disclosure or access.

Id. at 16 (emphasis added). And:

> In these statutes, *Congress has balanced individuals' privacy interests with countervailing public interests* in disclosure.

Id. at 21 (emphasis added). Through this "weighing of balances," Congress has essentially acknowledged that, indeed, disclosure of such records can serve important public interests. The DPPA's sole purpose is to allow Congress, rather than the states, to decide which of those interests are worthy.

The DPPA prohibits all state DMVs from disclosing any driver records for any purpose outside of certain enumerated exceptions. 18 U.S.C. § 2721. And those exceptions are not based upon commerce, but, as the Petitioners explain, upon a weighing of privacy concerns with other competing interests. The sole aim of the DPPA is to prohibit state motor vehicle agency employees from releasing driver information where Congress has determined that such disclosures are bad public policy, not to regulate interstate commerce. It does not limit its proscriptions to disclosures related to commerce, nor does it seek to regulate individuals who use DMV records for commercial purposes.

Had Congress intended to regulate the commercial use of DMV records through the DPPA, it could have placed restrictions on commercial purchasers or users, rather than state DMVs. Regulating the dissemination of DMV records is not only unnecessary for Congress to regulate the interstate trade in personal information, it is a remarkably poor mechanism to accomplish that purpose. Significantly, Congress made almost no effort in the DPPA to regulate this trade. On its face, the DPPA's treatment of the use of DMV information for mass marketing is so offhand, and so marginal in relation to the Act as a whole, that it leaves state policies regarding the distribution of records for mass marketing virtually intact. The DPPA only addresses itself to mass-marketing as the *twelfth* item in a list of *fourteen specific exemptions* to the basic nondisclosure provisions of the Act. And there, the DPPA specifically allows disclosure of driver records to mass marketers, with the single requirement that individuals be given an opportunity to "opt out" of having their own records revealed. 18 U.S.C. § 2721(12).

The Commerce Clause simply does not grant Congress authority to regulate any activity under its commerce power just because it can identify some factual link, however irrelevant or trivial, between the activity being regulated and interstate commerce. Rather, when it comes to intrastate noncommercial activities, a regulation's validity turns upon whether it targets the identified commerce. As explained in *Wickard v. Filburn*, 317 U.S. 111 (1942), the commerce power must be directed at commerce--it

> extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them *appropriate means to the attainment of a legitimate end*, the effective execution of the granted power to regulate interstate commerce.

Id. at 124 (citation omitted; emphasis added) (cited in *Lopez*, 514 U.S. at 555). Thus, federal regulation of these activities is valid only where such regulation is designed and appropriate for regulating interstate commerce. The DPPA does not fit into this mold. The DPPA's prohibition on disclosure is universal, qualified only by Congress' privacy sensibilities, not by interstate commerce concerns. For these reasons, this Court should hold that Congress exceeded its authority under the Commerce Clause in enacting the DPPA.

II

THE DPPA VIOLATES CONSTITUTIONAL PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND THE GUARANTEE CLAUSE OF ARTICLE IV

A. This Court's Decisions in *New York* and *Printz* Establish That Congress May Not Flatly Coerce States or State Agencies into Implementing Federal Policy

Even if this Court were to accept the premise that Congress could enact the DPPA under its commerce powers, this is not the end of the constitutional inquiry. The question remains whether the Constitution nonetheless establishes affirmative limitations on Congress' authority that would invalidate the DPPA. As the Fourth Circuit framed the issue, "the question before this Court is not whether the DPPA regulates commerce, but whether it is consistent with the system of dual sovereignty established by the Constitution." *Condon v. Reno*, 155 F.3d at 458. The State of South Carolina contends that the DPPA violates the Tenth Amendment. *Id.* at 455. The Tenth Amendment states:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

As this Court has explained at length, however, an assertion that Congress has violated the Tenth Amendment is more aptly characterized as an assertion that Congress has attempted to regulate the states in a way that is contrary to the federalism structure:

> The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.

New York v. United States, 505 U.S. at 157.

This Court's decisions in *New York* and *Printz* helped define the constitutional limitations the principle of federalism imposes on the ability of the federal government to encroach upon the internal operation of state government. Specifically, this Court held that, even where the federal government is operating within its enumerated powers, federalism nevertheless constrains the federal government from achieving legitimate ends by illegitimate means--that is, by coercion of the states. *New York*, 505 U.S. at 160; *Printz*, 521 U.S. at 2380-81.

In *New York*, the Supreme Court resolved the constitutionality of the "take title" provisions to the Low-Level Radioactive Waste Policy Act. The "take title" provision required that, if a state did not provide a means for the disposal of radioactive waste produced within the state, a generator or owner of the waste could, by request, force the state to take title to the waste. *New York v. United States*, 505 U.S. at 153-54. Alternatively, the statute compelled states to regulate waste according to Congress' instructions. *Id.* at 152-53. The sole challenge in *New York* was to the method by which Congress chose to regulate: through forcing states to take title to the waste, or, alternatively, requiring that they legislate in a certain manner. This Court held the "take title" provisions constitutionally infirm.

The Petitioners erroneously argue that *New York* stands only for the proposition that the federal government may not force the states to regulate private parties. Brief for the Petitioners at 28-30. While it is true this Court focused primarily upon that part of the statute which directed the states to legislate, the decision in *New York* was not so narrow. Indeed, the validity of the provision in question depended upon this Court's conclusion that both the "take title" mandate and the direction to legislate were unconstitutional:

> Because an instruction to state governments to take title to waste, *standing alone, would be beyond the authority of Congress*, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two.

New York, 505 U.S. at 176 (emphasis added). Indeed, the constitutionality of the simple mandate to the states to "take title" was so little questioned that this Court spared minimal space explaining the point. Thus, contrary to the Petitioners' characterization, *New York* did not announce a narrow rule that Congress may not force the states to legislate. Rather, it stood for a broader proposition: Congress may not coerce the states, through a simple mandate, into advancing federal ends.

In explaining this distinction, the Court identified means by which Congress could validly direct states to regulate according to federal standards. First, Congress can make the grant of federal funds dependent upon state compliance with federal mandates. *Id.* at 167. Second, Congress can regulate by offering states the choice of regulating according to federal standards or having state law preempted by a federal regulatory program administered by the federal government. *Id.* at 167. In describing the permissible means by which Congress can direct the states, the Court noted:

By either of these methods, as by any other *permissible method* of encouraging a State to conform to federal policy choices, the residents of the States retain the ultimate decision as to whether or not the State will comply. If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant. If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program, and they may continue to supplement that program to the extent state law is not pre-empted. Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

New York, 505 U.S. at 168 (emphasis added). But here, just as the "take title" provisions at issue in *New York* gave states a choice between two coerced alternatives, Congress has not employed any of the "permissible methods" described by the Court. The DPPA is not tied to any federal funding, and does not offer states a choice between state regulation according to federal dictates or direct regulation by the federal government. The DPPA is simply a mandate directing the states to administer their driver's records in the manner chosen by Congress.

To the extent the DPPA does not expressly direct state legislatures to legislate in a certain way, it is unlike *New York*.[6]

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[6] Of course, Congress anticipated that states would have to pass implementing legislation or regulations. *See, e.g.*, Odom and Feder, *Challenging the Federal Driver's Privacy Protection Act*, 53 U. (continued...)

Condon, 155 F.3d at 460. Instead, it goes directly to the conduct of state agency employees. However, this Court's decision in *Printz* has already flatly rejected the notion that Congress could bypass state legislatures and regulate state employees directly.

Printz was a Tenth Amendment challenge to the Brady Act, an amendment to the Handgun Control Act of 1968, regulating the sale of firearms. *Printz*, 521 U.S. at 903-04. Among its other provisions, the Brady Act required a firearms dealer to obtain information about prospective firearm purchasers on a federal form. *Id.* at 903. Once the dealer obtained this information, he or she was required to forward the form to the chief law enforcement officer of the county in which the prospective purchaser lived. *Id.* The officer was then required to undertake a "reasonable effort," including a background check, to insure that transfer of a firearm to the prospective purchaser would not violate state or federal law. *Id.* The officer was also required to undertake several other obligations with respect to handling the form and the information contained therein. *Id.* at 903-04.

Two county sheriffs challenged the background check provisions of the Brady Act on Tenth Amendment grounds. *Id.* at 904. The sheriffs contended that, as state employees, with their primary obligation and oath to fulfill their state law responsibilities, Congress could not force them to carry out these federal duties. *Id.* This Court agreed, and extended its holding in *New York*:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting

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[6](...continued)
Miami L. Rev. at 107 (State of Wisconsin legislature had to pass legislation to implement the DPPA).

> the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Printz, 521 U.S. at 935. This Court was not persuaded by the government's arguments that directing the conduct of state officers was less offensive to federalism than directing the conduct of state legislatures, stating:

> To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.

Id. at 931. Now, Congress has made another creative attempt to circumvent constitutional limitations on its powers. In the DPPA, Congress did not expressly declare an intent to force the states to change their laws, an avenue clearly proscribed by *New York*. Neither has Congress sought to conscript state employees into carrying out a federal regulatory program, as in *Printz*. Instead, Congress is forcing the states to administer their own regulatory programs according to federal policy directives.

But this effort aimed at exploiting a perceived loophole left by *New York* and *Printz* is even more offensive to principles of federalism. Here, Congress eschews entirely any relationship between the DPPA and a federal regulatory program. Indeed, the federal government has no interest in preempting the field of regulating drivers and motor vehicle registration. Instead, it leaves this regulatory responsibility, and its attendant costs and liabilities, to the states. But because Congress believes that motor vehicle departments ought to be run in a particular way, it enacted the DPPA to force states to regulate according to federal policy choices.

B. Petitioners' Attempt to Construct a Methodology for Determining Whether a Statute Violates Federalism Is Based on an Erroneous Interpretation of This Court's Decisions in *Baker* and *Garcia*

New York and *Printz* control the outcome of this case. Nonetheless, the Petitioners attempt to shoehorn the DPPA into what they style as a separate category of federal enactments upheld by this Court in *South Carolina v. Baker*, 485 U.S. 505 (1988), and *Garcia*, 469 U.S. 528. Brief for the Petitioners at 35-38. However, this attempt to distinguish the DPPA is based upon several false premises. First, they assert that *New York* and *Printz* only proscribe federal enactments that force states to regulate third parties. *See* Brief for the Petitioners at 35. Second, they contend that *Baker* and *Garcia* establish that any federal legislation is valid so long as Congress may regulate private parties upon the same basis. Brief for the Petitioners at 36-37.

The Petitioners' first argument is easily disposed of. This Court has never stated that federalism is only implicated where Congress forces states to regulate private third parties. As stated above, this Court's decision in *New York* revolved around the idea that Congress may not commandeer the states, not around the Petitioners' newly minted interpretation that such commandeering is *only* unconstitutional where that commandeering relates to private third parties. Instead, the decision in *New York* depended, in part, on finding that a simple mandate to the states to "take title" to radioactive waste was by itself unconstitutional. *New York*, 505 U.S. at 176. Indeed, this Court's recent decision in *Alden v. Maine*, 119 S. Ct. 2240, affirmed the idea that simple mandates to the states are no more immune from federalism challenges than the statutes at issue in *New York* and *Printz*. *Id.* at 2247. In *Alden*, this Court held that Congress lacks the constitutional authority to require state courts to entertain suits against the states to enforce federal

legislation under Article I. *Id.* at 2266. And neither *Baker* nor *Garcia* prove otherwise.

To the extent that any language in *Baker* and *Garcia* aids the Petitioners, it is difficult to conceive of how those cases determine the result in this case given this Court's subsequent federalism jurisprudence. Indeed, they can only aid the Petitioners if one treats them, as Petitioners implicitly suggest, as though they represent a distinct line of federalism jurisprudence apart from *New York* and *Printz*. But it is more accurate to say that these cases present a distinguishable set of facts, rather than a distinct body of federalism law.

For example, *Baker* dealt with a Tenth Amendment challenge to a federal law making income from unregistered state bonds subject to federal income tax. *Baker*, 485 U.S. at 510. Though this Court framed the issue "as if [the statute] directly regulated States by prohibiting outright the issuance of bearer bonds," *id.* at 511, the fact of the matter is, the statute did nothing of the kind. What it did do was make state-issued unregistered bonds unmarketable: "competition from other nonexempt bonds would force States to increase the interest paid on state bonds by 28-35%." *Id.* Because states could not afford to pay the increased bond rates, they ceased issuing them. *Id.*

Despite the loose language of that decision, and the Petitioners' suggestion that *Baker* stands for the unyielding proposition that Congress always has the power to regulate the states directly, the DPPA is not comparable to the facts in *Baker*. In changing the federal tax code in *Baker*, Congress' object was not the regulation of the states, its object was to enforce federal tax law. The resultant effect on state activities was purely incidental. *Baker* thus held that federalism did not require Congress to provide a *special exemption* for state activities.

Garcia, of course, presented yet another situation. But again, the facts there are readily distinguishable from the present case. In *Garcia*, this Court held that Congress could constitutionally regulate the states as "employers" under the Fair Labor Standards Act. *Garcia*, 469 U.S. at 554. In *New York* and *Printz*, this Court explained that *Garcia* did not control because these cases were not ones "in which Congress has subjected a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. *See also Printz*, 521 U.S. at 932. However, by that statement, this Court did not indicate that, if a law may generally be applied to states and private parties, such laws are *per se* constitutional. Instead, this Court acknowledged that federalism decisions arising in that context have "traveled an unsteady path" and that they presented a different question. *New York*, 505 U.S. at 160. Here, because the DPPA applies only to the states, it is not clear that *Garcia*, and what it may or may not stand for, is even relevant. *See Printz*, 521 U.S. at 932. But Petitioners nevertheless argue that, because Congress *could* subject private parties to privacy legislation similar to the DPPA, it is valid under a "generally applicable law" exception created by *Garcia*. Brief for Petitioners at 37.

The Petitioners' argument rests upon the unsubstantiated claim that "generally applicable laws, by their nature," do not violate the commandeering principle disallowed in *New York* and *Printz* because they never "require the states to participate in the regulation of private persons." Brief for the Petitioners at 37. But, as demonstrated above, whether or not Congress directed the states to regulate private parties was never the *sine qua non* for the holdings in *New York* and *Printz*. Further, this is a peculiar interpretation of *Garcia*; *Garcia* never said any such thing, and *New York* and *Printz* never suggested that *Garcia* was decided on that basis. Instead, the argument derives from the dissent below, where Judge Phillips attempted to recharacterize *Garcia* and *Baker* in light of this Court's

subsequent federalism decisions. *See Condon*, 155 F.3d at 468 (Philips, J., dissenting).

Interestingly, the dissent below correctly pointed out that, if the states do hold a special place in our federal system, it is absurd to postulate that federalism is not offended so long as the states are subject to the same laws as private entities. *Id.* at 467-68. Otherwise, Congress could invade state sovereignty at will simply by broadening its legislation to reach private entities as well as the states. Therefore, it is impossible legitimately to contend that the constitutionality of a federal statute rests upon such a dubious premise. There is no way to finesse the fact that *Garcia* stood for an extraordinarily broad proposition:

> [S]pecial restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Garcia, 469 U.S. at 552. Thus, *Garcia* held that the states could only rely on their necessary involvement in the national political process to ensure that Congress would not overstep its proper boundaries. But the problem with *Garcia* is that the limitations on federal power, properly acknowledged by this Court's prior decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruled by *Garcia*), were not themselves "judicially created," even if the test for determining those limitations were. Rather, as this Court's subsequent decisions in *New York*, *Printz*, and *Alden* have explained, the limitations on federal power, both within and without the context of the Tenth Amendment and state sovereignty, inhere in the Constitution itself. *See New York*, 505 U.S. at 156-57;

Printz, 521 U.S. at 905, *Alden*, 119 S. Ct. at 2246. Thus, the majority's approach in *Garcia* holds that judicial resolution of a Tenth Amendment challenge ultimately can be arrived at *not* by resort to constitutional analysis, but simply by reference to what the federal government has in fact already done.

In light of this Court's more recent federalism jurisprudence, the rationale of *Garcia* can no longer be regarded as sound. Indeed, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), this Court appeared to disavow *Garcia*'s broad rationale by stating that

> to say that the degree of [governmental power] dispers[ed] to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly.

Id. at 2233. That is, national government processes, deemed by the *Garcia* Court to be the only check on federal intrusion into state matters, is not, or is no longer, the proper test of assessing the constitutional validity of a statute in the face of a federalism challenge.

As a result, *Garcia* does not aid the Petitioners for three reasons: it does not apply in the present factual context, it does not stand for what the Petitioners claim, and the continued viability of what it *did* stand for is questionable. And while the present case may not present a suitable "occasion to apply or revisit the holding[]," *New York*, 505 U.S. at 160, of *Baker* or

Garcia,[7] the Petitioners' attempts here to reformulate *Garcia* into something it is not should be flatly rejected by this Court.

New York, *Printz*, *Alden*, and *College Savings Bank* all recognize that the constitutional principle of federalism places substantive limits on the ability of Congress to legislate in any way it chooses. More importantly, preserving federalism is critical because separating the federal government from state governments preserves individual freedom. The ability to retain that freedom is completely obliterated, however, if the federal government can simply displace a state's own management of state affairs with federal laws. When every state must administer its state programs according to one blanket federal dictate, states lose their uniqueness, indeed the very qualities that make a state a sovereign, and not a "mere political subdivision [ ] of the United States." *New York*, 505 U.S. at 188. It no longer matters that the states are divided by geographical boundaries if the boundaries do not also evidence a political boundary in which different groups of citizens are entitled to govern themselves by different laws.

Because the DPPA is not compatible with the federal structure of our government, this Court should affirm the decision of the Court below that the DPPA is unconstitutional on its face.

[7] However, the split in the court below as well as the conflict in the circuits on the constitutionality of the DPPA indicates that the federal courts need additional guidance from this Court upon the proper interpretation and continued validity of *Garcia*. *See, e.g., West v. Anne Arundel County, Maryland*, 137 F.3d 752, 757-60 (4th Cir. 1998) (Court asked for additional briefing on, and addressed in its decision, the continued validity of *Garcia* in light of *Printz*.)

C. The DPPA Violates the Guarantee Clause Because It Deprives State Citizens of the Ability to Establish the Policies Under Which Their Own State Agencies Operate

Article IV, Section 4, of the Constitution provides that "[t]he United States shall guarantee to every state in this union a republican form of government." Though the Guarantee Clause, as it is known, has been "an infrequent basis for litigation throughout our history," *New York*, 505 U.S. at 184, there is in that provision the expression of a federalism interest that is protected by the Constitution.

> The states cannot enjoy republican governments unless they retain sufficient autonomy to establish and maintain their own forms of government. The guarantee clause, therefore, implies a modest restraint on federal power to interfere with state autonomy.

Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Col. L. Rev. 1, 2 (1988).

> By the constitution, a republican form of government is guarantied to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.

Duncan v. McCall, 139 U.S. 449, 461 (1891). The Guarantee Clause provides further support for the principle that the Constitution protects South Carolina's operation of its own state government from federal encroachment.

As this Court explained in *Printz*, the Guarantee Clause

> presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.

Printz, 521 U.S. at 919 (citation omitted). In *Gregory v. Ashcroft*, 501 U.S. 452 (1991), as well, this Court elaborated on the rights protected by the Guarantee Clause. *Gregory* addressed whether the federal Age Discrimination in Employment Act applied to state judges, who, under the Missouri State Constitution, were required to retire at the age of 70. *Gregory*, 501 U.S. at 455. This Court applied a "plain statement rule," holding that, because Congress did not clearly express its intent to override the interests of the people of the State of Missouri in defining the qualifications of their constitutional officers, the Act would not apply. *Id.* at 461.

While this Court acknowledged that there exist some limitations on the ability of states to define the qualifications of their own state officials,[8] it nonetheless announced that its

> "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." [Citation omitted.] This rule "is no more than . . . a recognition of a State's constitutional responsibility for the establishment and operation of its own government."

[8] The primary limitation recognized by *Gregory* on the ability of states to select the qualifications of their own officials was the Equal Protection Clause. *Gregory*, 501 U.S. at 462. Indeed, the Court stated that, had Congress intended to regulate the retirement age of state justices, the law "would upset the usual constitutional balance of federal and state powers." *Id.* at 460. Thus, *Gregory* suggests that only constitutional provisions, and not congressional acts, can limit the power of states to determine the operation of their own governments.

Gregory, 501 U.S. at 462. This broad power of states to define who can hold state office

> is an authority that lies "'at the heart of representative government.'" It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government."

Id. at 463 (citations omitted).

Thus, the Guarantee Clause provides a specific textual basis for the principle, well-established by this Court in *New York* and *Printz*, that state governments are uniquely immune from the imposition of federal mandates on the operation of state governments. And though the DPPA, unlike the statute at issue in *Gregory*, does not impose limitations upon the ability of state citizens to determine the qualifications of state officials, the Guarantee Clause issue that arose in *Gregory* dictates the result in this case: state citizens have broad authority to determine how their own state agencies ought to function. As Judge Rymer explained in her concurring opinion in *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), in which the Ninth Circuit upheld a term limit initiative for state officials against a constitutional challenge,

> the Guarantee Clause restricts the federal government's power to interfere with the organizational structure and governmental processes chosen by a state's residents . . . . In order to ensure that state and local government remain responsive to their constituents, . . . citizens must have the power to choose the governmental forms that work best for them. *The guarantee clause, therefore, grants states control over their internal governmental machinery.*

Id. at 858 (citation omitted; emphasis added). Like *Gregory*, *Bates* dealt with the qualifications of state officials to hold state office. But Judge Rymer's understanding of the Guarantee Clause extends beyond that narrow context and includes the right of state citizens to have democratic control over their own government. Indeed, the right of state citizens to choose their state representatives is of no consequence if the federal government can nullify the authority of those representatives by dictating directly how a state government ought to conduct its official business. The power to choose a legislator is meaningless if a legislator has no power to establish the law.

Just as a state's citizens exercise their democratic will by defining who can hold state office and the qualifications of their elected officials, they also choose, through democratic processes, the laws and policies by which their state agencies and offices are run. And while every exercise of federal power can in some way force all state citizens to comply with national policies with which they disagree, the manner and means by which the DPPA acts upon the states is distinct from the usual form of federal law. Rather than imposing a policy directly upon a national constituency, who can respond through national political processes, the DPPA acts upon state government employees in their capacity as state employees. Not only do these employees have no special political recourse to the policies imposed by the federal government--that is, distinct from the general population--they are, unlike the general population, ultimately answerable to a state citizen constituency. Like the state legislature in *New York* and the law enforcement officers in *Printz*, the coercive obligations imposed upon these DMV employees under the DPPA places them in the untenable position of implementing federal policy at the behest of the federal government, but accountable to state citizens. And, as a consequence, the problem is the same: these government employees are not accountable to the individuals whom they serve. A republican form of government simply cannot exist

where one sovereign has the power to dictate the duties and obligations of another.

To establish accountability, state citizens must have the ability to impose their preferences upon their own state government. They also must have the ability to impress their preferences upon their state representatives in the national government. But what the state citizens are incapable of doing in their capacity as state citizens is to influence *other* state's representatives in the national government. Here, South Carolina's state government representatives had no say in the DPPA. As for South Carolina's national representatives, even the strongest expression of their preferences could only yield them a disproportionately low representation in the governance of their own affairs. In the enactment of the DPPA, South Carolina's national congressmen and senators had no more say in the internal workings of their own state's DMV operations than representatives *from other states*. As a result, South Carolina's state citizens have been deprived of any real power to govern the conduct of their own government officials.

The DPPA purported to overturn the open records policies of 34 states. Odom and *Feder, Challenging the Federal Driver's Privacy Protection Act*, 53 U. Miami L. Rev. at 101. The Petitioners blithely fail to acknowledge that this conversely demonstrates that 16 states had laws in place making driver information confidential prior to the enactment of the DPPA. In fact, in the State of California, the DPPA made driver records *less* confidential than they were under state law. *See* 79 Op. Att'y Gen. No. 76 (June 10, 1996). This fact, standing alone, amply demonstrates that states are and have been perfectly capable of addressing citizens' privacy concerns--and perhaps of addressing them more forcefully and creatively than Congress has done in the DPPA. But unlike the DPPA these varied state policies were implemented by state legislators acting in response to and accountable to the people these policies govern. Thus, the real issue in this case is not whether keeping driver records

confidential is good policy, it is who ought to be making this policy decision.

As evidenced by South Carolina's open records law, and the state's historical understanding that this law makes DMV records public, South Carolina's citizenry believes that the public interest of South Carolina is served by a different set of policy choices than those selected by Congress in the DPPA. The DPPA overrides the interests of South Carolina's citizens by declaring that the majority's will can be frustrated by a federal law that prevents the disclosure of these records. This is in direct conflict with the concept of a "republican" form of government.

Because the DPPA abrogates the principle of federalism by depriving state citizens of the ability to govern their own state motor vehicle agency through their democratic will, this Court should find that the DPPA violates the constitutional principle of federalism as protected by the Guarantee Clause.

CONCLUSION

To be valid, an exercise of Congress' commerce powers must be directed at an activity that substantially affects interstate commerce. The DPPA, which regulates the dissemination of driver information from state DMVs, does not meet this fundamental standard. The State of South Carolina compiles driver information for legitimate regulatory purposes, and releases this information according to the state's own policy choices. The legitimate operation of state government does not constitute interstate commerce. Further, while Congress found that driver records can be used for commercial purposes by third parties, the DPPA does not regulate this commercial activity. Instead, the DPPA is directed at regulating the administration of South Carolina's motor vehicle records for all purposes, without regard to interstate commercial impacts. This broad regulation of state activity is not a valid exercise of Congress' commerce authority.

Consistent with the Constitution's system of dual sovereignty, Congress lacks authority to direct states to legislate according to federal instructions or to conscript state officials into administering a federal regulatory program. The federalism structure memorialized by the Tenth Amendment and the Guarantee Clause bars Congress from interfering with the states in the operation of state government, no matter how much Congress may disagree with state policies. The DPPA is an attempt to abolish independent state policy by forcing the states to reorganize their internal government machinery to conform to federal dictates. The DPPA forces the citizens of South Carolina to be governed by a federal policy with which they disagree in the operation of their own state government. This coercion is an affront to state sovereignty protected by the Tenth Amendment and the Guarantee Clause of the United States Constitution.

For these reasons, this Court should affirm the decision of the Court below, and hold that the DPPA is unconstitutional.

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Respectfully submitted,

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